

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS

APR 13 2005

EVANSTON INSURANCE COMPANY,

Civil Action

No. 05-10742

Plaintiff,

v.

SUMMIT FINANCIAL CORPORATION and
 TIMOTHY DOHERTY,

Defendants.

05 - 10742 RCL

COMPLAINT FOR DECLARATORY JUDGMENT

MAGISTRATE JUDGE *Collins*

Introduction

1. This is an action under Massachusetts G.L. c. 231A for a declaration determining the respective rights, duties and obligations of the parties under a contract of insurance. Evanston Insurance Company ("Evanston") issued a policy to Summit Financial Corporation ("Summit") which provides coverage for liability arising out of "professional services" rendered by Summit as an employee benefit plan consultant, but excludes liability for any claim involving the insolvency or financial inability to pay any employee benefit plan. Summit and its employee Timothy Doherty seek coverage under this policy for a third-party complaint filed by Jeanne Bryant in her capacity as the court-appointed fiduciary of the Service and Business Workers of America Local 125 Benefit Fund (the "Fund"), an employee welfare plan offering health and dental insurance coverage. The third-party complaint alleges that the actions of the third party defendants have caused or contributed to the insolvency of the Fund. An actual controversy has

arisen among the parties regarding whether Evanston has any obligation to defend or indemnify Summit and Doherty.

Parties

2. Plaintiff Evanston Insurance Company (“Evanston”) is an insurance company duly organized under the laws of the State of Illinois.

3. Defendant Summit Financial Corporation (“Summit”) is an Massachusetts Corporation with a principal place of business in Lexington, Middlesex County, Massachusetts.

4. Defendant Timothy Doherty is an individual residing in Massachusetts, and is a principal of defendant Summit.

Jurisdiction and Venue

5. Jurisdiction is based upon 28 U.S.C. § 1332, in that the amount in controversy exceeds \$75,000 and the controversy is between citizens of different states.

6. Venue is proper under 28 U.S.C. § 1391, as defendants reside in this judicial district, the insurance policy was issued to Summit in this judicial district, and the defendants are subject to personal jurisdiction in this judicial district.

The Policy

7. Evanston Insurance Company issued Policy Number EO-816008 to Summit Financial Corporation/Summit Financial Insurance Agency, Inc. for the policy period from July 1, 2003 to July 1, 2004, with a retroactive date of July 1, 1995 (the “Policy”).

8. The Policy provides claims made professional liability coverage with limits of \$1,000,000 and a \$10,000 deductible.

9. The Policy's coverage grant, as amended by Endorsement No. 2, provides:

Professional liability and Claims Made Clause: To pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE INSURED DURING THE POLICY PERIOD by reason of any error or omission in professional services rendered or that should have been rendered by the Insured or by any person for whose errors or omissions the Insured is legally responsible, and arising out of the conduct of the Insured's profession as an actuary, actuarial consultant, employee benefit plan administrator and/or consultant and related insurance agents' services, professional claims administrator, and/or fiduciary of any employee benefit plan or a client;

PROVIDED ALWAYS THAT such error or omission happens:

- (a) during the policy period; or
- (b) subsequent to the Retroactive Date specified in the Declarations, provided that prior to the effective date of this policy the Insured had no knowledge of circumstances, involving such error or omission, which may result in a claim under this policy.

10. Insureds under the Policy include:

- (b) any employee of the Named Insured or predecessor firm as designated in Item 2 of the Declarations solely while acting in their professional capacity on behalf of the said firms;

11. The Policy includes the following definitions:

Employee benefit plan means, whenever used in this policy, group life, accident, health and disability benefits insurance, pension plans, profit sharing plans, employee stock subscription plans, employee travel, vacation and savings plan and workers' compensation plans.

Damages means, whenever used in the policy, compensatory damages, settlements, and awards provided always that Damages shall not include: (a) matters which are uninsurable under the law pursuant to which the policy shall be construed; (b) punitive damages and any multiplication,

including trebling, of damages; (c) fines, penalties imposed by law or taxes, other than the civil penalties imposed upon any of the Insureds as a fiduciary under section 502(i) or section 502(l) of the Employee Retirement Income Security Act of 1974, or its amendments; or (d) the restitution of consideration and expenses paid to the Insured for services or goods arising from acts deemed uninsurable by law.

12. The Policy contains the following exclusions, among others, providing that the policy does not apply:

- (a) to any claim based upon or arising out of any dishonest, deliberately fraudulent, malicious or knowingly wrongful act or omission committed by or at the direction of the Insured. However, notwithstanding the foregoing, the Company shall provide a defense for such claim without any liability on the part of the Company to pay such sums as the Insured shall become legally obligated to pay as damages.
- (m) to any claim based upon, arising out of, due to or involving, directly or indirectly, the insolvency, receivership, bankruptcy, liquidation or financial inability to pay of any pension, profit sharing, health and welfare or other employee benefit plan or trust;
- (q) to any claim based upon or arising out of the Insured gaining any personal profit or advantage to which the Insured is not legally entitled;
- (u) to any claim based upon or arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay, or any insurance company in which the Insured has placed or obtained coverage for a client or an account.

The Lawsuit

13. A complaint was filed on October 7, 2002 in the United States District Court For the District of Southern Florida, West Palm Beach Division, C.A. No. 02-CV-80945, by the Secretary of Labor against Service and Business Workers of America Local 125 (the "Union"), the Union's Benefit Fund, an employee welfare plan offering health and dental insurance coverage (the "Plan"), various Union officials and Plan

trustees, as well as the Plan's marketing and collections agent and a Union business agent.

14. The third-party plaintiff, Jeanne Bryant, was appointed as independent fiduciary of the Plan by the court on October 8, 2002, and was "specifically charged with maximizing the funds available to pay claims against the Plan and to pursue causes of action and effect recoveries on behalf of the Plan."

15. A third-party complaint was filed on January 5, 2004 and served on the insureds in January of 2004.

16. The third-party complaint identifies Summit Financial Corporation ("Summit") as "an insurance benefits consultant materially involved in the Plan engaging United International Insurance Co., Ltd. as an insurer for the Plan's members and/or associate members."

17. The third-party complaint groups Summit and Timothy Doherty, identified in the complaint as "a principal and/or employee at Summit," among the "United Defendants," defined as defendants affiliated with United International Ins. Co., Ltd. ("United").

18. The third-party complaint alleges that the Union was a front created to market health insurance to individuals at reduced rates.

19. The third-party complaint alleges that the Union and the Plan trustees and administrator caused or permitted the improper diversion of Plan assets, causing the Plan to become insolvent and millions of dollars of health claims to go unpaid.

20. The third-party complaint alleges that Union business agents allowed Plan participants to join the Union regardless of whether or not they were employed and of whether collective bargaining agreements or other union activities were involved.

21. The third-party complaint alleges that this resulted in a skewed population for the Plan with Plan participants of higher risk than one providing coverage to a bona fide Union.

22. The third-party complaint alleges that the Plan hired Windsor Benefit Consultants (“Windsor”) in 2001 to shift participants from a self-funded program to a fully-insured program, and that Windsor advised the Plan to engage United as its fully insured carrier.

23. The third-party complaint alleges that the United Defendants, including Summit and Doherty, “recommended and/or were materially involved in the recommendation, of United” to Harold Broglio, the President of the Union and a trustee of the Plan, and “received compensation from Plan funds, either directly or indirectly, due to their involvement in having United, ostensibly, provide coverage to the Plan.”

24. The third-party complaint alleges that millions of dollars in premiums were paid by the Plan to United and the other United Defendants, and that these defendants, including Summit and Doherty, knew or should have known that the Union was a sham and the Plan was a multiple employer welfare arrangement (“MEWA”) under ERISA.

25. The third-party complaint alleges that United never actually paid any claims, was not an authorized insurance carrier in the U.S., and was an unlicensed off-shore company.

26. The third-party complaint alleges that the Plan lacked sufficient assets to pay claims.

27. The third-party complaint alleges that the Court ordered the termination of the Plan in October 2002 at the request of the Department of Labor.

27. The third-party complaint asserts claims for violations of RICO, 18 U.S.C. § 1962, negligent misrepresentation, breach of contract, aiding and abetting and conspiracy, negligence, and unjust enrichment against Summit and Doherty as United Defendants, based upon their alleged role in causing the Plan to enter into the arrangement with United.

COUNT I

28. Evanston realleges and incorporates herein the allegations of paragraphs 1-27.

29. Evanston has no duty to defend or indemnify Summit or Doherty in connection with the claims in the third party complaint.

30. An actual controversy has arisen among the parties concerning their respective rights and obligations under the Evanston Policy.

31. The allegations in the third- party complaint are claims based upon, arising out of, due to or involving, directly or indirectly, the insolvency, receivership,

bankruptcy, liquidation or financial inability to pay of any pension, profit sharing, health and welfare or other employee benefit plan or trust.

32. The allegations in the third-party complaint are claims based upon or arising out of, due to or involving directly or indirectly the insolvency, receivership, bankruptcy, liquidation or financial inability to pay, of an insurance company in which the Insured has placed or obtained coverage for a client or an account

33. The allegations in the third-party complaint are, in whole or part, claims based upon or arising out of the Insured gaining a personal profit or advantage to which the Insured is not legally entitled.

34. The allegations in the third-party complaint are, in whole or part, claims based upon or arising out of a dishonest, deliberately fraudulent, malicious or knowingly wrongful act or omission committed by or at the direction of the Insured

35. The plaintiff has no obligation to defend or indemnify the defendants to the extent the Insureds had knowledge before the policy's effective date of circumstances involving the alleged error or omission which might result in a claim under the policy.

36. The plaintiff has no obligation to defend or indemnify the defendants to the extent the Insureds made material misrepresentations in their application for insurance.

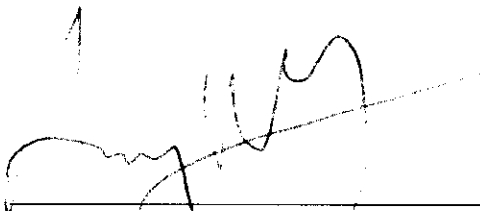
37. The plaintiff has no obligation to defend or indemnify the defendants to the extent they are held liable for punitive damages.

38. The plaintiff has no obligation to defend or indemnify the defendants to the extent the complaint fails to state a claim for "professional services" as defined in the policy.

WHEREFORE, Evanston requests the Court to enter judgment declaring that Evanston has no obligation to defend or indemnify Summit or Doherty in connection with the claims in the third party complaint.

EVANSTON INSURANCE COMPANY,

By its attorneys,

A handwritten signature in black ink, appearing to read 'Steven L. Schreckinger', is written over a horizontal line.

Steven L. Schreckinger (BBO #447100)

Harvey Nosowitz (BBO #556966)

PALMER & DODGE LLP

111 Huntington Avenue

Boston, MA 02199

(617) 239-0100

Dated: April 13, 2005

JS 44
(Rev. 3/99)

05-10742 RCL

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Evanston Ins. Co.

DEFENDANTS

Summit Financial Corp. and Timothy Doherty

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Illinois
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Middlesex, MA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

ATTORNEYS (IF KNOWN)

Harvey Nosowitz

Palmer & Dodge, 111 Huntington Ave, Boston, MA 02199

II. BASIS OF JURISDICTION

(PLACE AN "X" IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff
☐ 2 U.S. Government Defendant
☐ 3 Federal Question (U.S. Government Not a Party)
☒ Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | |
|---|---------------------------------------|---|----------------------------|
| PTF | DEF | PTF | DEF |
| <input type="checkbox"/> 1 | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of This State | | Incorporated or Principal Place of Business in This State | |
| <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | <input checked="" type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen of Another State | | Incorporated and Principal Place of Business in Another State | |
| <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |
| Citizen or Subject of a Foreign Country | | Foreign Nation | |

IV. NATURE OF SUIT

(PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY <input type="checkbox"/> 352 Personal Injury — Med. Malpractice <input type="checkbox"/> 355 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence HABEAS CORPUS: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS — Third Party 26 USC 7609

V. ORIGIN

(PLACE AN "X" IN ONE BOX ONLY)

- ☒ 1 Original Proceeding
☐ 2 Removed from State Court
☐ 3 Remanded from Appellate Court
☐ 4 Reinstated or Reopened
☐ 5 Transferred from another district (specify)
☐ 6 Multidistrict Litigation
☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY.)

Diversity — 28 U.S.C. Sec. 1332 — Declaratory judgment of rights and obligations under insurance policy

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☒ NO**VIII. RELATED CASE(S) IF ANY**

(See instructions): JUDGE

N/A

DOCKET NUMBER

N/A

DATE

4/13/05

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) Evanston Insurance Company
v. Summit Financial Corp.

2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).

 I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.

 II. 195, 368, 400, 440, 441-444, 540, 550, 555, 625, 710, 720, 730,
740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950.

*Also complete AO 120 or AO 121
for patent, trademark or copyright cases

 X III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310,
315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371,
380, 385, 450, 891.

 IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660,
690, 810, 861-865, 870, 871, 875, 900.

 V. 150, 152, 153.

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3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(G)). IF MORE THAN ONE PRIOR RELATED CASE HAS BEEN FILED IN THIS DISTRICT PLEASE INDICATE THE TITLE AND NUMBER OF THE FIRST FILED CASE IN THIS COURT.
N/A

4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT?

YES NO **X**

5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? (SEE 28 USC §2403)

YES NO **X**

IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY?

YES NO **X**

6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC §2284?

YES NO **X**

7. DO ALL OF THE PARTIES IN THIS ACTION, EXCLUDING GOVERNMENTAL AGENCIES OF THE UNITED STATES AND THE COMMONWEALTH OF MASSACHUSETTS ("GOVERNMENTAL AGENCIES"), RESIDING IN MASSACHUSETTS RESIDE IN THE SAME DIVISION? - (SEE LOCAL RULE 40.1(D)).

X YES NO

A. IF YES, IN WHICH DIVISION DO ALL OF THE NON-GOVERNMENTAL PARTIES RESIDE?

EASTERN DIVISION **X** CENTRAL DIVISION WESTERN DIVISION

B. IF NO, IN WHICH DIVISION DO THE MAJORITY OF THE PLAINTIFFS OR THE ONLY PARTIES, EXCLUDING GOVERNMENTAL AGENCIES, RESIDING IN MASSACHUSETTS RESIDE?

EASTERN DIVISION CENTRAL DIVISION WESTERN DIVISION

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Harvey Nosowitz

ADDRESS Palmer & Dodge LLP, 111 Huntington Avenue, Boston, MA 02199

TELEPHONE NO. (617)239-0100